90-1105

Supreme Court, U.S.
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Case Number:

SUPREME COURT OF THE UNITED STATES
October Term, 1990

Jerome H. Bradshaw, Connie Davis, Thomas J. Farrell, Louis Fontanazza, James Glover, Maria O. Gonzalez, Donald Greene, Angel Gutierrez, Heather D. Hallada, Harold Hallada, Russell Herringdine, Charles P. Hewitt, William N. Hughes, J. Carlton Johns, Margaret M. Kane, Howard M. Katz, Glenn H. Logan, Lawrence R. Menge, Allen T. Poole, Amos Ragans, Albert Richman, J. Albert Rodin, Joseph J. Rossi, Luis E. Sanmiguel, Leonard Sbaldigi, David Schuman, Richard Shapiro, Daniel Shemer, Eugene Smith, Arthur Soares, Alex Sulikowski, Helen R. Sumrall, Melvin Trager, John Ware, Willie G. Washington,

Petitioners,

v.

Pantry Pride Enterprises, Inc., a Pennsylvania corporation,

Respondent.

Petition for Writ of Certiorari to the
District Court of Appeal, State of Florida,
Third District

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QUESTIONS PRESENTED FOR REVIEW

I.

Under ERISA (29 USC § 1001, *et seq.*), can an employer modify the terms of a severance pay policy to exclude certain employees from receiving benefits, without complying with the disclosure requirements of ERISA (thereby depriving the effected employees of knowledge of the change in the severance pay policy), then entice the employees to remain in its employ during a period of transition following the sale of one of its divisions (prior to closing on the sale) by promising the employees that if they will remain in place, they will receive their severance benefits plus a specific bonus, and after closing the sale, fail to pay the severance benefits based upon the undisclosed, changed severance policy.

LISTING OF ALL PARTIES

Petitioners:
Jerome H. Bradshaw
Connie Davis
Thomas J. Farrell
Louis Fontanazza
James Glover
Maria O. Gonzalez
Donald Greene
Angel Gutierrez
Heather D. Hallada
Harold Hallada
Russell Herringdine
Charles P. Hewitt
William N. Hughes
J. Carlton Johns
Margaret M. Kane
Howard M. Katz
Glenn H. Logan
Lawrence R. Menge
Allen T. Poole
Amos Ragans
Albert Richman
J. Albert Rodin
Joseph J. Rossi
Luis E. Sanmiguel
Leonard Sbaldigi
David Schuman
Richard Shapiro
Daniel Shemer
Eugene Smith
Arthur Soares
Alex Sulikowski
Helen R. Sumrall
Melvin Trager
John Ware
Willie G. Washington

Respondent:
Pantry Pride Enterprises, Inc.
a Pennsylvania corporation

Parent Companies and Nonwholly owned subsidiaries:

Revlon, Inc.

(Others which may exist are unknown to Petitioners and were not able to be located by Petitioners' counsel.)

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Under ERISA (29 USC § 1001, *et seq.*), an

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employer can not modify the terms of a severance pay policy to exclude certain employees from receiving benefits, without complying with the disclosure requirements of ERISA, where the failure to disclose the change as required deprives the effected employee from being able to intelligently decide whether the employee will remain with the employer or seek alternative employment. 8

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REFERENCE TO OPINIONS DELIVERED IN THIS CASE

Bradshaw v. Pantry Pride Enterprises, Inc.,
566 So.2d 1306 (Fla. 3d DCA 1990)

JURISDICTIONAL STATEMENT

Petitioners rest jurisdiction of this case with this Court under the Federal question jurisdiction contained in 28 USC § 1257(a). A state court of last resort, the District Court of Appeal of the State of Florida, Third District, has decided a federal question, *i.e.,* whether a procedural violation of ERISA (failure to disclose policy terms) has worked a substantive harm on Petitioners, in a way that conflicts with the decision of a United States court of appeals. The ninth circuit, in *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985), and the eleventh circuit, in *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987), have held under similar situations that the failure to disclose policy terms as required by ERISA worked a substantive harm on plaintiff/employees and allowed recovery.

A. Date of entry of opinion sought to be reviewed:

July 3, 1990

B. Date of entry of order denying motion for rehearing:

October 12, 1990

C. Statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari:

28 USC § 1257(a)

STATUTES AND REGULATIONS INVOLVED IN CASE

29 USC §§ 1022 – 1024[1]

[1] For full text of statutes, see Appendix beginning on page 11.

STATEMENT OF THE CASE

I. CAUSES OF ACTION

Thirty-five former mid-level managers of three divisions of Pantry Pride Enterprises, Inc., seek review by certiorari of the summary judgment enter against them in their suit for severance pay benefits, unpaid vacaton benefits and unpaid bonus compensation brought as an ERISA action coupled with several common law claims and a state statutory action. The summary judgment exonerating the employer was affirmed on appeal by the state court of last resort, the District Court of Appeal of the State of Florida, Third District[2]. The court construed the terms of a severance plan that was enacted but never communicated to Plaintiffs[3] as precluding Plaintiffs from recovering. Plaintiffs sought over $880,000[4] plus attorney's fees.

Each Plaintiff was advised, at the time that he or she was hired into management, of the terms of a severance policy. What each was advised and when each was advised (and by whom) is contained in a chart in the appendix, labelled "Chart" beginning on page 38. The severance policy was not in writing. Most of the

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[2] Petitioners requested that the district court of appeal certify the question presented to the Supreme Court of the State of Florida as being a question of "great public concern" which would vest the state supreme court with discretionary jurisdiction to review the case. The district court of appeal declined. Therefore, the state supreme court had no discretion to review the case.

[3] Petitioners will be referred to in this Petition by the position they held in the trial court—Plaintiffs, or by the term "Petitioners."

[4] The $880,000 is comprised of $505,698.73 of severance benefits, $28,667.44 of unpaid vacation benefits, and $349,753.27 in prejudgment interest.

Plaintiffs were hired into management, and told of the oral severance policy, long before the enactment of ERISA. In 1976, Defendant first reduced a severance policy to writing, but Defendant never complied with the disclosure requirements of ERISA, and never distributed to each Plaintiff (or any of them) a copy of the written severance policy or changes to them.

Defendant's business took a downturn, and eventually Defendant filed for Chapter 11 reorganization. Most Plaintiffs stuck with Defendant through the Bankruptcy, and helped pull Defendant's business out of Chapter 11.

Ultimately, Defendant decided to sell that portion of the business that employeed Plaintiffs. Selling the portions as on-going businesses would bring a much higher price than selling the assets without anyone to operate them. Therefore, it enticed the Plaintiffs to stay on board through the sale by promising that each would receive his or her severance pay plus a bonus (with the specific method of calculating the bonus disclosed[5]). After the sale, Defendant refused to pay any severance benefits, and refused to pay the promised bonus.

Plaintiffs asserted that the oral severance policy actually communicated to them should apply (resulting in recovering severance benefits), and that the written policy, which would exclude them, should not because it was never disclosed to them in violation of the disclosure requirements of ERISA. The appellate court discussed the conflict among the federal circuits in whether the failure to comply with the disclosure requirements of ERISA would prevent the enforcement of a plan that was detrimental to the uninformed employees, but decided the case adverse to Plaintiffs by applying the wrong policy. (App. 4, fn. 4.)[6]

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[5] See "Severance Policies" in the appendix, page 44.

[6] The abbreviation "(App.)" refers to the appendix to this petition. The abbreviation "(L.C. App.)" refers to the lower court appendix,

The decision of the trial court, affirmed by the appellate court, comports with neither logic nor justice. Defendant told Plaintiffs, as an inducement to employment, that they would receive certain severance benefits. When Defendant contemplated selling divisions as on-going businesses, admittedly bringing a price higher than a non-operating business (L.C. App. 458-460), it decided to change the severance benefits. It also decided not to tell all of the employees, in direct violation of ERISA. At the same time, it entered into "Golden Parachute" arrangements with its top level management. (L.C. App. 339-340.)

Compounding its lack of fairness, Defendant intentionally deceived Plaintiffs by promising to pay them a bonus if each Plaintiff would remain in the employ of Defendant until the closing on the sale of the division, thereby maximizing the profits to Defendant. (L.C. App. 458-460.) After the closing on the sale, Defendant refused to pay the bonus, and advised each Plaintiff that they would not receive the severance benefits due to the undisclosed severance policy. Plaintiffs sued; the trial court found that the actions of Defendant were permitted under ERISA, and entered summary judgment accordingly. The summary judgment entered by by the trial court does violence to the expressed purpose of ERISA and the public policy underlying it.

Plaintiffs' complaint alleged four causes of action: (1) breach of employment contract, (2) breach of implied contract, (3) ERISA violations, and (4) violation of Chapter 812, FLA. STAT. (1987) [Civil Theft]. (R. 47-59.) The trial court found that the common law counts were pre-empted by ERISA, and found that, in spite of admitted violations of ERISA, Defendant was not obligated to pay Plaintiffs the severance pay benefits and other benefits Plaintiffs sought. (R. 287, 335.) Plaintiffs believe that the common law

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and "(R.)" refers to the lower court record on appeal, neither of which has not been transmitted with this petition because of its extreme length—containing the transcript of 40 depositions and 35 answers to interrogatories.

counts were not pre-empted by ERISA, and that they are entitled to the severance benefits.

II. STAGE IN PROCEEDINGS WHERE FEDERAL QUESTION RAISED

The federal question sought to be reviewed was raised in the trial court at the time of filing the complaint. The Second Amended Complaint, upon which the case was decided, is contained in the appendix, beginning at page 30. It was raised by virtue of its forming a basis for relief in the complaint. The trial court disposed of the federal question by granting summary judgment to the employer, Defendant PANTRY PRIDE. The summary judgment is contained in the appendix under the heading of Judgment Sought to be Reviewed, beginning on page 7.

The federal question sought to be reviewed was raised in the appellate court by way of the initial brief filed by Plaintiffs/Petitioners. The appellate court believed that it avoided answering the question[7], but so decided by determining that a specific written policy which had never been disclosed to Plaintiffs applied to deprive Plaintiffs of any severance benefits. See the text of the opinion of the state district court of appeal set forth in the appendix beginning at page 1.

III. UNCONTESTED FACTS

The record before the trial court at the time of considering Defendant's Motion for Summary Judgment consisted of answers to interrogatories by all parties, the depositions of the Plaintiffs, the deposition of Elwood W. Adams, Jr., (formerly employed by Pantry Pride, Inc. as a Director of Personnel Services), Howard F. Gordon (employed by Revlon Group, Inc., a successor by merger to Defendant, as Vice President and General Counsel), and Darrell V. Stiffler (previously Senior Vice President of Rosen Food Stores, a

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[7] See the text of the opinion following footnote 14, at page 3.

purchaser of one of the divisions of Defendant, who handled labor relations, employee benefits and human resources).

That record disclosed that Plaintiffs are former employees of Defendant who obtained employment with purchasers of the Pantry Pride facilities at which they worked. In each instance, Plaintiffs' employment with the successor employer involved virtually identical job duties, compensation and insurance benefits, but did not involve the same severance benefits. Each Plaintiff began working for the successor employer immediately upon cessation of work for Pantry Pride, there being no break in employment.

Upon learning that their division would be sold by Pantry Pride, Plaintiffs inquired about the severance benefits they had previously been told would be paid to them. The inquiry, together with Defendant's responses, will be discussed in more detail below. Defendant ultimately refused to pay any severance benefits to Plaintiffs. Defendant failed to pay vested vacation benefits to many of the Plaintiffs, and failed to pay a supplement to the regular pay promised to the employees to keep them on board pending a sale of the division, thereby keeping the value of the division at a higher level than if no employees were in place. (L.C. App. 458–460.)

It is uncontested that most Plaintiffs were orally advised of the existence and terms of severance plans by their supervisors. A few Plaintiffs were advised by co–workers. Most Plaintiffs were so advised at the time of their hire into management. (*See Chart, page 38.*) Many were hired into management from former union positions. In the move from union to non–union, managerial employment, certain Plaintiffs realized that they would make less money. They asked why they should leave their union positions for management. They were advised of many benefits including severance pay. They were told that they would be paid two weeks' salary for every year that they had worked for the company, for a maximum of 32 weeks. Based upon those representations, those Plaintiffs left their union positions with their benefits, and took the managerial positions with the severance benefits appertaining thereto.

Plaintiffs testified in deposition about how they were advised of the severance policy, and what they told was the severance policy. The chart in the appendix contains a synopsis of the testimony of each Plaintiff, showing the number of years each Plaintiff was employed, where he was employed at the time of severance, the date he started employment with Pantry Pride, how he was told of the severance policy, when he was told of the severance policy, and what he was told of the severance policy. Record citations supporting the information are identified in the pages following the chart.

Pantry Pride defended by, among other things, asserting that the severance policy in effect at the time of the termination of Plaintiffs provided that Plaintiffs were not entitled to any severance pay. (R. 122–128.) Plaintiffs assert that summary judgment was improper because there was a genuine question of material fact concerning which severance policy would apply to Plaintiffs in light of Defendant admittedly violating the disclosure requirements of ERISA by never advising Plaintiffs of the change in the severance pay policy. (L.C. App. 347–349.)

Pantry Pride first put a severance pay policy in writing in 1976, long after Plaintiffs were orally advised of the terms of the severance pay policy as an inducement to move from union to non–union, management employment. As will be seen later, no Plaintiff ever saw the last revision to the policy prior to his termination from Pantry Pride. It is this unpublished policy that Defendant, Pantry Pride asserts precludes it from having to pay severance.

IV. SEVERANCE POLICY

As previously stated, Plaintiffs assert that genuine issues of material fact existed precluding summary judgment. The first such issue was what severance policy applied.

A. Which severance pay policy applies to Plaintiffs.

There are five severance pay policies with which we are

concerned. They are set forth in the appendix, under the heading of Severance Policies, beginning on page ?.

Another promise was made and breached by Defendant through authorized employees Duane Buck and Tom Ballezzi, to the employees at the Philadelphia location. They advised the Philadelphia employees that if they stayed with Pantry Pride until the sale of the division, Pantry Pride would pay a bonus of 1 week for every 2 years employed by Pantry Pride with a minimum of 4 weeks, in addition to the severance pay. (L.C. App. 819, line 7 through 9, App. 820, lines 24 and following.)

Plaintiffs seek the granting of a writ of certiorari, resulting in the reversal of the summary judgment, and a remand with directions to the trial court to enter judgment for Plaintiffs in an amount equal to the severance pay applicable to each (with the terms of the orally communicated severance pay policy applicable to each Plaintiff determined by the jury after a trial on the merits), plus interest on such amount at the legal rate since the termination of each Plaintiff from Defendant's employ, plus the bonus promised to each Plaintiff and interest thereon at the legal rate since it was due, plus the unpaid vacation benefits due each Plaintiff and interest thereon at the legal rate since it was due, plus costs, interest and attorney's fees.

Plaintiffs assert that the trial court misapplied the law concerning breaching the disclosure requirements of ERISA. In entering its summary judgment, the trial court must have determined that Defendant's violation of the disclosure requirements of ERISA, specifically implemented to keep ERISA benefactors apprised of their benefits, was inconsequential.

Plaintiffs seek a reversal of the summary judgment with a determination that the breach of the disclosure requirements of ERISA results in the inability of Defendant to use it as a shield to preclude meeting its commitment to pay severance benefits.

ARGUMENT

Under ERISA (29 USC § 1001, *et seq.*), an employer can not modify the terms of a severance pay policy to exclude certain employees from receiving benefits, without complying with the disclosure requirements of ERISA, where the failure to disclose the change as required deprives the effected employee from being able to intelligently decide whether the employee will remain with the employer or seek alternative employment.

V. PURPOSE OF ERISA

29 USC § 1001 states the policy behind ERISA:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of [employee benefit] plans. . . .

Plaintiffs contend that the summary judgment entered by the trial court, shielding Defendant from liability in spite of its failure to comply with ERISA, subverts the policy behind ERISA.

VI. STANDARD OF REVIEW

This Court, in *Firestone Tire and Rubber Company v. Bruch*, --- U.S. ---, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), established the standard for reviewing an employer's denial of severance pay benefits:

> . . . Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. . . . Thus, for purposes of actions under § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "factor[] in determining whether there is an abuse of discretion." RESTATEMENT (SECOND) OF TRUSTS § 187, Comment d (1959).

Id., at 956–7.

The record before the trial court, and this Court, does not disclose the type of discretion given to the administrator. Plaintiffs were entitled to a de novo review from the trial court because the record did not disclose that "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." The trial court erred in entering summary judgment for Defendant primarily because the record clearly established a breach by Defendant of the disclosure requirements of ERISA, which breach rose to the level of a substantive harm to Plaintiffs. As a result, the effort to alter the severance policy to specifically exclude Plaintiffs from it should not be sanctioned. The policy that was disclosed to Plaintiffs (most predominantly, orally) should be the severance policy enforced by the court.

The decision of the state appellate court of last resort conflicts with the decision of two United States court of appeals on the same issue. As held by the Ninth Circuit in *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985):

> When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendant's procedural violations thus work a substantive harm. . . .
>
> * * *
>
> . . . May the same failure to satisfy reporting or fiduciary standards go judicially unnoticed in determining the company's obligations under the written expression of the plan? Like the Donovan court[8]; we answer "no."
>
> * * *
>
> . . . Not coincidentally, the evils against which ERISA was enacted to guard -- insecurity, lack of knowledge and inability to police plan administration -- are just the evils that appear in Del Monte's administration of its plan. . . .

The other case with which the lower court decision conflicts is *Harris v. Pullamn Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987), which will be discussed more fully later.

The only case decided subsequent to *Firestone Tire and Rubber Company v. Bruch*, having somewhat similar facts to the case at bar is *Lakey v. Remington Arms Company, Inc.*, 874 F.2d

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[8] *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

541 (8th Cir. 1989).[9] While recognizing the decision of *Firestone Tire and Rubber Co. v. Bruch*, the Eighth Circuit found that the administrator of the plan had the discretionary power identified in *Firestone Tire and Rubber Co. v. Bruch*, that would cause the arbitrary and capricious standard to be applied. The distinction between *Lakey* and the case at bar is that we do not have in the record any of the discretionary powers referred to in *Firestone Tire and Rubber Co. v. Bruch* that would cause the arbitrary and capricious standard to apply.

VII. DISCLOSURE REQUIREMENTS OF ERISA

29 USC § 1022(a)(1) and 29 USC § 1024, governing filing requirements and furnishing of information, contain the disclosure requirements of ERISA. These statutes are set forth *verbatim* in the appendix, beginning on page **. Defendant admits violating those provisions of ERISA. (Depositions of Adams, page 14, and Stiffler, pages 9–11.) Each Plaintiff stated that he did not receive a copy of the severance pay policy or any summary thereof. (*See* Chart, page 38.)

VIII. EXAMINATION OF PRECEDENT

A. Decisions of this Court

This Court has published forty–one decisions and orders containing the acronym "ERISA," but only one of them assists this court in resolving this matter, *Firestone Tire and Rubber Company v. Bruch*, --- U.S. ---, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).

Firestone maintained and was the plan administrator and fiduciary of, a severance pay plan and two other funded employee benefit plans governed by ERISA. Firestone sold its plastics

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[9] The District Court decision is not reported in F.Supp.

division to Occidental Petroleum Co. (Occidental), which hired all of the employees of the plastics division. The employees sought severance benefits under the severance pay policy, but Firestone denied their request on the ground that there had not been a "reduction in work force" that would authorize benefits under the terms of the plan. The employees sued for severance benefits and other damages. The District Court granted summary judgment for Firestone, holding that the company had satisfied its fiduciary duty as to the benefits requested because its decision not to pay was not arbitrary or capricious. The Third Circuit reversed and remanded the case, holding that benefit denials should be subjected to a *de novo* judicial review rather than review under the "arbitrary and capricious" standard when the employer is the administrator and fiduciary of an unfunded plan since deference to the decision of the fiduciary is unwarranted given the lack of assurance of impartiality of the employer's part.

The severance pay plan provided, in part:

> If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work force or if you become physically or mentally unable to perform your job.
>
> The amount of termination pay you will receive will depend on your period of credited company service.

At the time of the sale of its plastics division, Firestone was not aware that the termination pay plan was governed by ERISA, and therefore had not set up a claims procedure nor complied with ERISA's reporting and disclosure obligations with

respect to that plan.[10]

Firestone denied respondent's severance benefits on the ground that the sale of the plastics division to Occidental did not constitute a "reduction in work force" within the meaning of the termination pay plan.

The Third Circuit reversed the summary judgment on Count I of the complaint which sought severance benefits. It remanded the case for further proceedings consistent with its opinion.

This Court affirmed that portion of the decision of the Third Circuit which reversed the summary judgment, remanding the case to the District Court for further proceedings consistent with the opinion. In so doing, this Court noted, at 955:

> ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans,: *Shaw v. Delta Air Lines, Inc.*, 463 US 85, 90, 103 S.Ct. 2890, 2896, 77 L.Ed.2d 490 (1983), and "to protect contractually defined benefits," *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 US, at 148, 105 S.Ct., at 3093.

Consistent with *Firestone*, this Court should reverse the summary judgment entered in favor of Defendant.

B. Eleventh Circuit Court of Appeals

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[10] In the case at bar, there is nothing in the record showing establishment by Defendant of a claims procedure as required by ERISA. Therefore, the record shows another genuine issue of material fact--did Defendant violate ERISA by failing to establish a claims procedure.

The Eleventh Circuit has published eighty-two opinions containing the acronym "ERISA." Of these, two are factually similar to the case at bar, *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987) and *Anderson v. Ciba-Geigy Corporation*, 759 F.2d 1518 (11th Cir. 1985).

The facts in *Harris* are remarkably similar to the facts in the instant case. It was a suit by three former managerial employees of Pullman Standard for severance pay. Pullman closed a plant, and put the property up for sale. Most of the salaried employees were terminated and given severance pay. The three plaintiffs, however, remained at the plant beyond the closing date because Pullman offered them an incentive bonus equal to 25 percent of their base salary if they would continue to work at the plant for a short time. In the letter making that offer, a vice-president advised the plaintiffs that they would receive the special incentive bonus in addition to all other regular severance and benefit arrangements. Plaintiffs in the instant case received the same promise and inducement to stay on board while the divisions were sold.

Pullman sold all of its operations and assets to Trinity Industries, Inc. Plaintiffs were hired by Trinity at the same jobs they formerly held with Pullman, with two of the plaintiffs receiving a 12% cut in pay. Pullman refused to pay severance because the plaintiffs had never been unemployed, having been hired by Trinity. The severance policy did not contain any exception concerning the sale of a plant or division. In our case, Defendants *disclosed* severance policy did not contain any exception concerning the sale of a plant or division, but its concealed policies did. In affirming the summary judgment in favor of the employees, awarding them severance, the Eleventh Circuit found that the refusal to pay the severance benefits was arbitrary and capricious for four reasons, among them was:

Fourth, the District Court held that Pullman

> violated the procedural requirements of ERISA by failing to furnish copies of the benefits policy to all salaried employees, not just management such as the plaintiffs, and by failing to have any claims procedure. Pullman contends that any procedure violations, if present, do not entitle the plaintiffs to substantive relief. The Ninth Circuit in *Blau v. Del Monte Corp.* 748 F.2d 1348 (9th Cir. 1984) acknowledged that, ordinarily, violations of ERISA's procedural requirements do not entitle a claimant to substantive relief. Nevertheless, the quantity of an employees procedural violations may work a substantive harm. *Ibid*, at 1354. In this case, the unavailability of the policy for the great number of the employees and the complete lack of any formal claims procedure in addition to Pullman's interpretation of its policy prove that Pullman has acted arbitrarily and in bad faith when interpreting and implementing its policy.

The record before the trial court, in the instant case, was clear--there was no compliance with the disclosure requirements or claims procedure requirements of ERISA. Plaintiffs had received certain promises and incentives when they agreed to become managerial employees. Those promises were changed and the incentives taken away secretly, and in violation of the statute enacted to assure dissemination of information to employees. This court should not sanction such action.

The second Eleventh Circuit case involving somewhat similar facts is *Anderson v. Ciba-Geigy Corporation*, 759 F.2d 1518 (11th Cir. 1985). *Anderson* involved a severance policy that had a "special situation" exception to the plan, and the exception was fully disclosed to the employees. In fact, the court says at 1522:

> Furthermore, plaintiffs were on notice that they might not receive severance benefits. Not only was section 2.9.2 in their employee handbooks, but Ciba-Geigy implicitly said that no benefits would be given those employees accepted by the purchaser when replying to employees' questions regarding the then inchoate sale plans for REN Telecommunications.

Therefore, *Anderson* is of little benefit in resolving the case at Bar.

C. Decisions of Other Circuits

1. Directly on Point with Our Facts

Blau v. Del Monte Corporation, 748 F.2d 1348 (9th Cir. 1985) concerned a suit by non-union salaried employees of Del Monte Corporation for severance benefits. The court stated:

> In 1966, Del Monte purchased Granny Goose, which became a wholly owned subsidiary of Del Monte. Employees of Granny Goose were eligible for coverage under various pension and benefit plans of Del Monte, including Del Monte's written -- but confidential -- "separation allowance policy." This policy was in effect at the time Granny Goose was sold as an ongoing business and is the subject of this action. . . .
>
> * * *
>
> The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive remedial statute designed to protect working men and women and to cure widespread weaknesses in the private pension system. To strengthen the pension system, ERISA established minimum vesting, funding, fiduciary

and disclosure requirements which every pension plan must meet. It also delineated a specific uniform standard of conduct for fiduciaries. *See generally* H.R.REP. NO. 93-533, 93d Cong., 2d Sess., reprinted in 1974 U.S.CODE CONG. & AD. NEWS 4639.

* * *

29 USC § 1002(1). Section 186(c), cited in subsection (B) above, specifically lists "severance benefits." The effect of citing to Section 186(c) is "to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar . . .. 29 CFR § 2510.3-1(a)(3). *See Donovan v. Dillingham*, 688 F.2d 1367, 1370-73 (11th Cir. 1982) (*en banc*). Thus, the severance pay plan in this case is an employee welfare benefit plan to which ERISA applies.

Neither the vesting and participation requirements nor the funding requirements of ERISA apply to employee welfare benefit plans such as severance plans, 29 USC §§ 1051(1), 1081(a)(1), but the reporting and disclosure requirements, 29 USC §§ 1021-1031, and the fiduciary responsibility standards, 29 USC §§ 1101-1114, do. Thus, Del Monte severance pay plan is subject to ERISA's reporting, disclosure, and fiduciary requirements. Once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and recording requirements detailed under ERISA. [Citations omitted.]

* * *

The administrator of an employee welfare plan such as this severance benefit policy, has no discretion to

secret the plan, to flout the reporting, disclosure and fiduciary obligations imposed by ERISA, or to deny benefits in contravention of the plan's plain terms. [Citations omitted.] It is undisputed that the administration of this plan failed to comply with these reporting, disclosure and fiduciary requirements. Del Monte's decision to deny benefits in this case was made in the course of and could have been infected by, these ERISA violations. Thus, the defendants' decision could not be said, as a matter of law, not to be arbitrary and capricious, and summary judgment was inappropriately granted to Del Monte at this stage of the proceedings.

The undisputed facts show that defendants fail to comply with virtually every applicable mandate of ERISA. The separation allowance policy was "confidential," i.e., secret, in contravention of ERISA reporting and disclosure provisions. 29 USC §§ 1021–1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 USC § 1133; the code of federal regulations establishes exactly what will be considered reasonable:

(1) a claims procedure will be deemed to be reasonable only if it:

(i) complies with the provisions of . . . this section . . . .

(ii) is described in the summary plan description . . .,

(iii) does not contain any provision and is not

administered in a way, which unduly inhibits or hampers the initiation and processing of plan claims, and

(iv) provides for informing participants in writing in a timely fashion, of the time limits . . .

29 CFR § 2560.503-1(b)(1) . . .. Here, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure failed simply because there was none.

* * *

Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. The importance of disclosure applies to welfare benefit plans as well as to pensions:

Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether to plan wise . . . being administered as intended. It was expected that the information disclosed would enable employees to police their plans.

H.R.REP. NO. 93-533, 93d Cong. 2d Sess. Rep. in 1974 U.S.CODE CONG. & AD. NEWS 4639, 4649 . . ..

When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that

> disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendant's procedural violations thus work a substantive harm. . . .
>
> * * *
>
> . . . May the same failure to satisfy reporting or fiduciary standards go judicially unnoticed in determining the company's obligations under the written expression of the plan? Like the Donovan court[11], we answer "no."
>
> * * *
>
> . . . Not coincidentally, the evils against which ERISA was enacted to guard -- insecurity, lack of knowledge and inability to police plan administration -- are just the evils that appear in Del Monte's administration of its plan. . . .

Blau should be dispositive of this case. The facts are similar, and the court is clear as to why the failure to disclose the change in the severance policy does violence to the purpose of the disclosure requirements of ERISA. Fairness (i.e., equity) dictates that Plaintiffs should be told the true nature of their benefits, and if Defendant tells them one thing, and then changes it, Defendant must tell them of the change for it to be effective.

IX. CONFLICTING CASES FROM OTHER CIRCUITS

Young v. Standard Oil (Indiana), 849 F.2d 1039 (7th Cir. 1988) was cited by Defendant in its Motion for Summary Judgment, for the proposition that management may unilaterally change severance policy, and by doing so deny severance pay to employees, and the denial will not be found to be arbitrary and capricious. While that is a correct representation of the principle of the case, the change in the standard as announced by the

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[11] *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

Supreme Court in *Firestone Tire and Rubber Company v, Bruch*, and the distinction in the facts of the case, renders *Young* to be of no great help in resolving the case at bar. First of all, *Young* was decided under the "arbitrary and capricious" standard. For the purpose of Defendant's Motion for Summary Judgment, the *de novo* review standard applies.

Secondly, there is a significant distinction in facts. In *Young*, the employer admitted that it did not provide copies of the new severance policy or explain severance benefit claim procedures to the plaintiffs. However, they point out that all employees were informed where to write or call for information concerning the severance policy. In the case at bar, none of the 35 plaintiffs were advised of any of the limitations placed upon the written severance policy, they were not provided copies of the severance policy as implemented or revised, and they were not told where to call or write for information.

Defendant next cited *Schwartz v. Newsweek, Inc.*, 827 F.2d 879 (2d Cir. 1987). *Schwartz* concerned employees of Newsweek who were terminated by Newsweek and immediately hired by the purchaser of a division of Newsweek. The most distinguishing feature of *Schwartz* is that the severance policy was communicated to the affected employees on numerous occasions, and in many forms, prior to the sale of the division. The employees were advised by letter that if they accepted employment with the successor they would not be eligible for severance pay from Newsweek unless their employment with the successor terminated within 3 months of the hiring date. Those employees who did not wish to join the successor and who also failed to obtain other suitable positions at Newsweek would be terminated and given severance pay.

The court goes on to specifically find that:

Newsweek informed plaintiffs through written and

> oral announcements in January, 1982, of a severance policy providing that *Inside Sports* staff members who accepted employment with active markets would be ineligible for severance pay unless they were dismissed within 3 months after commencing such employment. Each plaintiff thus was given the option of: (1) accepting employment with active markets and losing Newsweek's severance benefits or (2) seeking continued employment with Newsweek and receiving severance benefits if that employment cannot be arranged.

In finding that the denial of severance benefits was neither arbitrary nor capricious, the court announced its reasons for that finding. The first reason was that the severance policy was publicly announced. The second reason was it was neither deceptive of plaintiffs nor defeated their reasonable expectations. *Schwartz v. Newsweek, Inc., supra*, at 882.

In the case at bar, the record is clear that the Defendant violated ERISA by failing to disseminate its severance pay policy to those affected. In fact, most of the Plaintiffs, enquiring about severance pay after the sale of their division was announced, met with supervisors who did not know the company's severance policy had been changed in an effort to exclude them from coverage.

Schwartz also adopted the statement from *Anderson v. Ciba-Geigy Co.*, 759 F.2d 1518, 1522 (11th Cir. 1985) that "even-handedness of treatment is evidence of good faith." The record shows a lack of even-handedness of treatment among the employees of Defendant. The upper level management employees all had "golden parachutes." Upon a sale of the division, those employees received 120% of salary for 6 months. (Adams deposition.)

Last of all, *Schwartz v. Newsweek, Inc., supra,* was decided under the inapplicable arbitrary and capricious standard.

After *Schwartz* was decided, a District Court within the Second Circuit (where *Schwartz* was decided) issued its opinion in *Bennett v. Gill & Duffus Chemicals, Inc.*, 699 F.Supp. 454 (S.D. NY 1988). *Bennett* was an action by former employees brought against a former employer to recover severance benefits under ERISA. The former employees had been hired by the purchasing corporation with their employment starting immediately upon the closing of the sale. Just as in this case, in *Bennett*:

> [e]very plaintiff . . . commenced employment with [the successor] . . . at the same position, with at least the same salary, and with substantially the same responsibilities as he or she had with [the previous employer]. . . . In addition, "[n]o plaintiff who accepted employment with [the successor] was unemployed between employment with [the prior employer] and employment with [the successor]."

Ibid, at 456.

In finding that plaintiffs were entitled to severance pay, the court stated at 457:

> We are also particularly mindful of the plan administrator's procedural violations in implementing the severance policy. Chemicals concedes, as it must, that it gave employees no notice or description of the severance benefit plan. Defendant's trial brief at 47. Its actions were in violation of ERISA's reporting and disclosure requirements (29 USC § 1021 *et seq.*) and claims procedure requirements (29 USC § 1133). This

> neglect of Chemicals' officers, some of whom are now in the incongruous position of being plaintiffs in this action, caused other employees the type of harm ERISA specifically sought to prevent. As we noted in our prior opinion, the general purpose of ERISA is to protect workers from abuses in the administration and investment of private employee welfare and retirement plans.[12] *See generally* H.R.REP. NO. 93-533, 93d Cong., 2d Sess. reprinted in 1974 U.S.Code Cong. & Admin. News 4639. Chemicals' workers could not protect themselves from abuses in the administration of their severance plan when they were unaware of its terms and, indeed, of its very existence.

The foregoing is exactly why in the case at bar, the court is called upon to determine that the oral statements given to the employees of the existence and terms of the severance policy must control. Those oral terms were unconditional, providing that severance pay would be paid when the employee terminated from the employ of the Defendant unless the employee was discharged for cause.

While Defendant's argument that Plaintiffs should receive no severance pay since they never missed a day's work is

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[12] 29 USC § 1001 states the policy behind ERISA:

> [O]wing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation and administration of [employee benefit] plans. . . .

reasonable on its face without further consideration, the court in *Bennett* recalled the dual purpose for severance benefits:

> In addition, we must note that severance benefits serve two purposes. Severance pay can be given to reward past service to a company as well as to provide protection against future unemployment. The Second Circuit recognized this dual function in *Gilbert v. Burlington, Industries, Inc.*, [765 F.2d 320 (2nd Cir. 1985)] in the course of deciding that state law is preempted by ERISA. Burlington had sold a division to a buyer who retained all the employees in their same jobs, and the employees brought suit under the provision of the severance policy that provided for benefits to those "involuntarily terminated" from the company. Discussing the purpose of severance pay, the court noted that "severance pay is often a reward for past service." 765 F.2d at 325. *Cf. Local 879, Allied Industrial Workers of America v. Chrysler Marine Corp.*, 819 F.2d 786, 788 (7th Cir. 1987) (Court's review of arbitrator's award of severance pay noted that "while one purpose of severance pay is to provide income between jobs, it also compensates employees for their service and for termination for reasons unrelated to their conduct").

In reaching its decision, the court stated:

> The court thus finds that, prior to March 15, 1983, it was Chemicals' policy to grant severance pay to employees who were involuntarily terminated from their employment from the company whether or not they suffered a subsequent period of unemployment. The policy was conditioned simply on the involuntary separation from Chemicals. The

> severance policy rewarded the employees' previous commitment to Chemicals and, at the same time, served to alleviate the pain of unemployment for some. When the plaintiffs were severed from Chemicals on March 15, 1983, a new condition was added to the policy: Terminated employees subsequently employed by the company that purchased Chemicals' assets were not eligible for severance pay. Although plaintiffs were, indisputably, involuntarily terminated without cause from Chemicals, that condition was no longer sufficient. Contrary to Chemicals' assertions, the company did not distinguish between those employees who went to work for Steuber and those who did not, as much as it distinguished between those employees who were terminated on March 15, 1983, and those who were terminated prior to that date. Accordingly, we find that Chemicals' denial of severance benefits to plaintiffs was arbitrary and capricious.

Ibid, at 462.

Defendant next cited *Adcock v. Firestone Tire and Rubber Company*, 822 F.2d 623 (6th Cir. 1987), pointing out in two sentences that the Sixth Circuit affirmed a summary judgment finding that the decision to deny severance pay was not arbitrary and capricious. As we have already seen, the arbitrary and capricious standard has been disapproved by the Supreme Court except in exceptional circumstances not present in our case. Therefore, the case is of very little precedential value; however, the following language from the opinion shows that the failure to comply with ERISA's disclosure requirement was a concern:

> Firestone's company-wide termination pay policy was set forth in its Salaried Personnel Manual

("SPM") and Handbook for Salaried Employees ("the Handbook"). The SPM is a comprehensive and confidential document that was distributed only to personnel managers and senior executives, though relevant portions were made available to employees upon request. The Handbook was distributed to all salaried employees. The Handbook stated that the employees were entitled to termination pay if they were released from the company because of a RIF. The SPM described a RIF as a termination when "necessary to eliminate a position because of reduced workload or due to economic necessity." According to the SPM, the goal of this termination pay was to minimize "the economic and mental stress of terminated employees . . . between release from Firestone and securing other employment."

* * *

. . . The District Court began by noting that the SPM would not be heavily relied on, as its contents had not been communicated to the employees in accordance to the dictates of ERISA. In a similar vein, the District Court noted that, by defendants' own admission, Firestone had not complied with the disclosure requirements of ERISA with regard to the termination pay plan in general, but that this non-compliance was not so severe or intentional as to constitute arbitrary and capricious conduct on defendant's part.

The District Court then turned to the language of ERISA, and observed that ERISA did not provide for the vesting of employee benefit plans, and that this "silence" constituted a "gap" which had to be

filled by federal common law. The District Court determined that plaintiffs had a binding contractual right to termination pay, with the offer being the description of the plan in the Handbook, and the acceptance being plaintiffs continuing to work for Firestone. As such, the District Court concluded that plaintiff's entitlement to these benefits was vested, and that if Bridgestone terminated any plaintiff in the future under circumstances that constituted a RIF under the plan, defendants would be responsible for benefits. However, the court also concluded that given defendants' past practices, it was not improper for them to deny benefit payments at the time of the plant sale, as plaintiffs were not yet unemployed, therefore no RIF had occurred.

The record in the case at bar is devoid of any purpose for the severance pay policy as written by Defendant, and no purpose was expressed in the oral communications (being the only communications made to Plaintiffs). Defendant's non-compliance with ERISA is so severe that the non-compliance should be held against Defendant.

Defendant's reliance on *DeAngelis v. Warner Lambert Company*, 641 F.Supp. 467 (S.D. NY 1986) is totally misplaced since it involved a case totally dissimilar to the one at bar. In *DeAngelis*, the company sold all of the stock it held in a subsidiary corporation to a purchaser. The corporate existence continued with the same name and same employees, even though the owner of the corporation was different. The court rightfully found that the sale of the stock did not constitute a termination of employees of the subsidiary.

Interestingly, a district court within the Second Circuit interpreted *DeAngelis* in *Accardi v. Control Data Corporation*,

658 F.Supp. 881 (S.D. New York 1987). In *Accardi*, the District court denied the employer's motion for summary judgment, ***and granted summary judgment to the employees***, all of whom were formerly employed by a division of IBM, participating fully in the IBM employee benefits plans. The court handled the "windfall" argument (also made by Defendant in the case at bar) thusly:

> Thirdly, as we have already discussed, the concept that financial hardship need be established to entitle one to severance pay is foreign to the basic philosophy underlying IBM's employment policies. The purpose expressed in the Benefits Agreement was to reward . . . employees for their *past services* and to assure the *continued loyalty and high morale* of other IBM employees who relied upon IBM's unique reputation for security.
>
> Defendant further contends that awarding severance benefits to plaintiffs would constitute a windfall double recovery, since they would receive both salary from ADP and severance pay. The short answer to that contention is, as already noted, that the IBM plan specifically provides for such double recovery unless the dismissed employee is rehired by IBM itself.

Id., at 885–886 [emphasis added].

Defendant's violation of ERISA, in failing to disseminate summary plan descriptions to the employees and failing to establish a claim procedure (and to disseminate that to the employees), should not be condoned.

CONCLUSION

Summary judgment was improperly entered. There exists

genuine issues of material fact precluding summary judgment. Among those issues is the issue of which severance pay policy should be applied to Plaintiffs. Based upon the admitted violations of the disclosure and claims procedure requirements of ERISA, the severance pay policy *actually communicated* to Plaintiffs should be applied.

The trial court erred in its application of the law to the facts presented. The violations of ERISA, although procedural in nature, rose to the level of substantive harm to Plaintiffs. Summary judgment in favor of Defendant does violence to the purpose for ERISA expressed by Congress.

The summary judgment should be reversed, and this case remanded to the trial court for further proceedings, with directions to apply the severance policy actually communicated to each Plaintiff, to each Plaintiffs claim.

Further, the summary judgment finding ERISA preemption of the contractual action for the promised bonus should be reversed since ERISA does not preempt promises to pay bonuses.

APPENDIX

Bradshaw v. Pantry Pride Enterprises, Inc.,
566 So.2d 1306 (Fla. 3d DCA 1990)

Jerome H. BRADSHAW, et al., Appellants,
v.
PANTRY PRIDE ENTERPRISES, INC., a Pennsylvania corporation, Appellee.
No. 89-2067.
District Court of Appeal of Florida,
Third District.
July 3, 1990.
Rehearing Denied Oct. 12, 1990.

After employer sold its operations to its successor, employees sued employer for severance pay. The Circuit Court, Dade County, Jack M. Turner, J., entered summary judgment for employer, and employees appealed. The District Court of Appeal, Jorgenson, J., held that the written severance pay policy did not entitle employees to severance pay. Affirmed.

[1]
255K72
MASTER AND SERVANT
K. Additional compensation.
Fla.App. 3 Dist. 1990.

Employees were not entitled to severance pay under written severance pay policy which provided that employer would pay severance pay to workers affected by closing of plant or department; there was no closing of plant or department, but rather, there was complete sale of divisions to purchasers, and each employee, without any interruption in employment simply continued at his or her former job, albeit with successor employer.

BRADSHAW v. PANTRY Pride Enterprises, Inc.
566 So.2d 1306, 15 Fla. L. Week. 1752

[2]
255K72
MASTER AND SERVANT
K. Additional compensation.
Fla.App. 3 Dist. 1990.

"Severance pay" is, by definition, payments made to employee after employment relationship is severed.

Bradshaw v. Pantry Pride Enterprises, Inc.
566 So.2d 1306, 15 Fla. L. Week. 1752

Gossett, McDonald, Gossett & Crawford, P.A., and Ronald P. Gossett, Hollywood, for appellants.
Shapiro & Bregman, P.A., and Kenneth G. Spillias, West Palm Beach, for appellee.

Before BARKDULL, JORGENSON and GODERICH, JJ.

JORGENSON, Judge.

Plaintiffs, thirty-five former mid-level managers of divisions of Pantry Pride Enterprises [Pantry Pride], sued Pantry Pride for severance pay ad various other benefits. The action was filed under the Federal Employee Retirement Income Security Act, 29 U.S.C. s 1001 et seq. [ERISA], and also alleged various state common-law causes of action. The trial court entered summary judgment for the employer on the common-law claims on the basis of federal preemption. On the remaining count, which alleged violations of ERISA, the trial court entered summary judgment for the employer. We affirm.

In 1976 Pantry Pride issued a written severance pay policy

which provided that "[t]he Company will pay severance pay on a weekly basis to eligible management personnel affected by the closing of a plant or department and who remain actively at work through the date set by the Company in accordance with the following schedule ..." (emphasis added). Pantry Pride revised that policy in writing in 1981 to provide that "[n]o severance pay will be paid to employees ... in accordance with policy and past practice, upon being offered employment by or obtaining successor employment with the purchaser of an operation or department." Beginning in August, 1983, Pantry Pride began to sell its distribution warehouses in Jacksonville and Miami. All of the plaintiffs were hired by the purchasers. Each plaintiff obtained employment with virtually identical job duties and compensation as he or she had enjoyed with Pantry Pride. Moreover, each plaintiff began working for the successor employer immediately after the sale was completed; there was no interruption in employment. When plaintiffs applied for severance pay from Pantry Pride, Pantry Pride denied their claims.

[1][2] Simply put, the employees claim that, pursuant to the 1976 policy statement, they are entitled to severance pay because the 1981 modification to that policy, although written, was never disclosed to them. Because Pantry Pride violated the disclosure provisions of ERISA[13], they contend, the 1981 modification is not viable. Although we agree with the parties that the severance pay policies were employee welfare benefit plans within the meaning of ERISA[14], we see no need to delve

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[13] 29 U.S.C. §§ 1021–1023.

[14] *See, e.g., Young v. Standard Oil*, 849 F.2d 1039 (7th Cir.1988) (severance pay plan subject to ERISA requirements), *cert. denied*, 488 U.S. 981, 109 S.Ct. 529, 102 L.Ed.2d 561 (1988); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir.1984) (same), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985).

into the intricacies of ERISA, its disclosure requirements, or the relief to be provided to employees allegedly aggrieved by those perceived procedural violations. Assuming that Pantry Pride violated the disclosure provisions of ERISA, and assuming, without deciding, that the relief to be afforded for such violations is, in fact, enforcement of the 1976 policy[15], the employees, nevertheless, are not entitled to severance pay by the plain terms of the policy statement which they seek to enforce. The 1976 policy grants severance pay to certain employees "affected by the closing of a plant or department...." Here, there was no such closing.

Instead, there was a complete sale of divisions of Pantry Pride, and each employee, without any interruption in employment simply continued at his or her former job, albeit with a successor employer.[16] "Severance pay is, by definition, payments made to an employee after the employment relationship is severed." *Donno v. Burger King Corp.*, 510 So.2d 1166, 1167 (Fla. 3d DCA 1987). Although Pantry Pride technically severed its relationship with the plaintiffs, the express terms of the 1976

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[15] In fact, it is not at all clear that an employer's failure to disclose rises to the level of a substantive harm that would render the non-disclosed plan void and not enforceable. *See Young v. Standard Oil*, 849 F.2d 1039 (7th Cir.1988) (procedural violations of ERISA not so flagrant as to prevent application of plan); compare *Blau v. Del Monte*, 748 F.2d 1348 (9th Cir.1984) (where employer actively concealed plan from employees, disclosure violations of ERISA were egregious and wholesale, and rendered denial of benefits arbitrary and capricious).

[16] Pantry Pride moved to dismiss the plaintiffs' action on this basis; the trial court denied the motion.

policy do not allow plaintiffs to receive severance pay.[17] Severance pay is like other benefits afforded to employees as part of a welfare or social security type scheme that are not given as payment for services rendered by an employee. Instead, they are considered employment 'entitlements' which are given because of a perceived societal or moral obligation to financially assist an employee when he or she is unable to work because of old age, employment-related accidents or physical disabilities, sickness or layoffs. It is thought uncivilized in a highly modern economy to throw employees out of work with no money whatever when they are permanently or temporarily non-productive or unneeded on the job due to forces beyond their control.

Coleman v. City of Hialeah, 525 So.2d 435, 437 (Fla. 3d DCA), *rev. denied*, 536 So.2d 243 (Fla. 1988).

Under the terms of the 1976 severance pay policy, and considering the nature and purpose of severance pay, Pantry Pride properly denied the employees' applications for severance pay. Plaintiffs never were unemployed, never were laid off, and never lost a day's wages. The trial court was therefore correct in entering summary judgment for the employer, albeit for the wrong reason.

Affirmed.

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[17] But see *Demerath v. Nestle Co.*, 121 Wis.2d 194, 358 N.W.2d 541 (Wis.App.1984) and cases cited therein. In *Demerath*, the court held that employees were entitled to severance pay where the employer's personnel policy stated that such benefits would be paid to employees who were involuntarily terminated through the closing of a plant. The court held that the employees were entitled to severance pay even though they suffered no interruption in employment or loss of wages upon being hired by the purchaser.

Order on Rehearing

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA THIRD DISTRICT

July Term, A.D. 1990 Friday, October 12, 1990

CASE NO: 89-2067

Jerome H. Bradshaw, *et al.*

Appellants,

v.

Pantry Pride Enterprises, Inc.,
a Pennsylvania corporation,

Appellee.

/

Upon consideration, appellants' motion for rehearing, clarification and certification is hereby denied. Appellants' motion for rehearing *en banc* is denied.

GOSSETT & GOSSETT, P.A. 3595 Sheridan Street, Suite 204, Hollywood, Florida · 983-2828

Judgment Sought to be Reviewed

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 85-39409 CA 19

RICHARD SHAPIRO, et al.,

Plaintiffs,

v.

PANTRY PRIDE ENTERPRISES, INC., etc.

Defendant.

_____/

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on the Motion of Defendant PANTRY PRIDE ENTERPRISES, INC. for Final Summary Judgment, and the Court having heard the arguments of counsel, reviewed the file and existing case law and having further determined that there is no genuine issue as to any material fact, it is hereby:

ORDERED AND ADJUDGED:

1. Final Summary Judgment is entered in favor of Defendant and against Plaintiffs on Count III of Plaintiffs' Second Amended Complaint.

2. This Court having previously entered Final Summary Judgment as to Counts I, II and IV of Plaintiffs' Second Amended complaint in favor of Defendant and against Plaintiffs.

3. The issue of entitlement to costs and/or attorneys' fees shall be determined at a separately noticed hearing upon proper motion.

DONE AND ORDERED in Chambers, this 20th day of July, 1989, in Miami, Dade County, Florida.

/s/
JACK M. TURNER, CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 85-39409 CA 19

RICHARD SHAPIRO, et al.,

Plaintiffs,

v.

PANTRY PRIDE ENTERPRISES, INC., etc.

Defendant.

_____/

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court on the Motion of Defendant PANTRY PRIDE ENTERPRISES, INC. for Final Summary Judgment, and the Court having heard the arguments of counsel, reviewed the file and existing case law and having further determined that there is no genuine issue as to any material fact, it is hereby:

ORDERED AND ADJUDGED:

1. Defendant's Motion for Summary Judgment as to Counts I, II and IV of Plaintiff' Second Amended Complaint is hereby granted on the basis that such claims are preempted by the Federal E.R.I.S.A. Statute, which is the subject matter of Count III of Plaintiffs' Second Amended Complaint.

2. Defendant's Motion for Final Summary Judgment as to Count III is hereby taken under advisement by the Court.

DONE AND ORDERED in Chambers, this 18th day of July, 1989, in Miami, Dade County, Florida.

/s/
JACK M. TURNER, CIRCUIT JUDGE

TITLE 29--LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
Subtitle B--Regulatory Provisions
Part 1--Reporting and Disclosure

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

§ 1023. Annual reports

(a) Publication and filing

(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 1024(a) of this title, and shall be made available and furnished to participants in accordance with section 1024(b) of this title.

(B) The annual report shall include the information described in subsections (b) and (c) of this section and where applicable subsections (d) and (e) of this section and shall also include--

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

(2) If some or all of the information necessary to enable the administrator to comply with the requirements of this subchapter is maintained by--

(A) an insurance carrier or other organization which provides some or all of the benefits under the plan, or holds assets of the plan in a separate account,

(B) a bank or similar institution which holds some or all of the assets of the plan in a common or collective trust or a separate trust, or custodial account, or

(C) a plan sponsor as defined in section 1002(16)(B) of this title, such carrier, organization, bank, institution, or plan sponsor shall transmit and certify the accuracy of such information to the administrator within 120 days after the end of the plan year (or such other date as may be prescribed under regulations of the Secretary).

(3)(A) Except as provided in subparagraph (C), the administrator of an employee benefit plan shall engage, on behalf of all plan participants, an independent qualified public accountant, who shall conduct such an examination of any financial statements of the plan, and of other books and records of the plan, as the accountant may deem necessary to enable the accountant to form an opinion as to whether the financial statements and schedules required to be included in the annual report by subsection (b) of this section are presented fairly in conformity with generally accepted accounting principles applied

on a basis consistent with that of the preceding year. Such examination shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the books and records of the plan as are considered necessary by the independent qualified public accountant. The independent qualified public accountant shall also offer his opinion as to whether the separate schedules specified in subsection (b)(3) of this section and the summary material required under section 1024(b)(3) of this title present fairly, and in all material respects the information contained therein when considered in conjunction with the financial statements taken as a whole. The opinion by the independent qualified public accountant shall be made a part of the annual report. In a case where a plan is not required to file an annual report, the requirements of this paragraph shall not apply. In a case where by reason of section 1024(a)(2) of this title a plan is required only to file a simplified annual report, the Secretary may waive the requirements of this paragraph.

(B) In offering his opinion under this section the accountant may rely on the correctness of any actuarial matter certified to by an enrolled actuary, if he so states his reliance.

(C) The opinion required by subparagraph (A) need not be expressed as to any statements required by subsection (b)(3)(G) of this section prepared by a bank or similar institution or insurance carrier regulated and supervised and subject to periodic examination by a State or Federal agency if such statements are certified by the bank, similar institution, or insurance carrier as accurate and are made a part of the annual report.

(D) For purposes of this subchapter, the term "qualified public accountant" means--

(i) a person who is a certified public accountant, certified by a regulatory authority of a State;

(ii) a person who is a licensed public accountant, licensed by a regulatory authority of a State; or

(iii) a person certified by the Secretary as a qualified public accountant in accordance with regulations published by him for a person who practices in States where there is no certification or licensing procedure for accountants.

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 1024(a)(2) of this title, a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section--

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this subchapter, the term "enrolled actuary" means an actuary enrolled under subtitle C of subchapter

II of this chapter.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under subsection (b) of this section as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

(b) Financial statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and

the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest

to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectible and the following information with respect to each loan on such schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectible; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organization, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and

a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is--

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

(c) Information to be furnished by administrator

The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature

of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

(d) Actuarial statement

With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 1081(b) of this title, or (C) a plan described both in section 1321(b) of this title and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 1081(a) of this title) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial

assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 1082 of this title.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 1082 of this title and a statement explaining the basis of such valuation of present value of assets.

(6) Information required in regulations of the Pension Benefit Guaranty Corporation with respect to:

(A) the current value of the assets of the plan,

(B) the present value of all nonforfeitable benefits for participants and beneficiaries receiving payments under the plan,

(C) the present value of all nonforfeitable benefits for all other participants and beneficiaries,

(D) the present value of all accrued benefits which are not nonforfeitable (including a separate accounting of such benefits which are benefit commitments, as defined in section 1301(a)(16) of this title), and

(E) the actuarial assumptions and techniques used in determining the values described in subparagraphs (A) through (D).

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary--

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 1082(c)(3) of this tile (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4) of this section.

(10) A statement by the actuary which discloses--

(A) any event which the actuary has not taken into account, and

(B) any trend which, for purposes of the actuarial assumptions used, was not assumed to continue in the future, but only if, to the best of the actuary's knowledge, such event or trend may require a material increase in plan costs or required contribution rates.

(11) If the current value of the assets of the plan is less than 70 percent of the current liability under the plan (within the meaning of section 1082(d)(7) of this title), the percentage which such value is of such liability.

(12) Such other information regarding the plan as the Secretary may by regulation require.

(13) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more

frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

(e) Statement from insurance company, insurance service, or other similar organizations which sell or guarantee plan benefits

If some or all of the benefits under the plan are purchased from and guaranteed by an insurance company, insurance service, or other similar organization, a report under this section shall include a statement from such insurance company, service, or other similar organization covering the plan year and enumerating--

(1) the premium rate or subscription charge and the total premium or subscription charges paid to each such carrier, insurance service, or other similar organization and the approximate number of persons covered by each class of such benefits; and

(2) the total amount of premiums received, the approximate number of persons covered by each class of benefits, and the total claims paid by such company, service, or other organization; dividends or retroactive rate adjustments, commissions, and administrative service or other fees or other specific acquisition costs paid by such company, service, or other organization; any amounts held to provide benefits after retirement; the remainder of such premiums; and the names and addresses of the brokers, agents, or other persons to whom commissions or fees were paid, the amount paid to each, and for what purpose. If any such company, service, or other organization does not maintain separate experience records covering the specific groups it serves, the report shall include in lieu of the information required by the foregoing provisions of this paragraph (A) a statement as to the basis of its premium rate or subscription charge, the total amount of premiums or subscription charges received from the plan, and

a copy of the financial report of the company, service, or other organization and (B) if such company, service, or organization incurs specific costs in connection with the acquisition or retention of any particular plan or plans, a detailed statement of such costs.

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary–

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for

inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

(2)(A) With respect to annual reports required to be filed with the Secretary under this part, he may by regulation prescribe simplified annual reports for any pension plan which covers less than 100 participants.

(B) Nothing contained in this paragraph shall preclude the Secretary from requiring any information or data from any such plan to which this part applies where he finds such data or information is necessary to carry out the purposes of this subchapter nor shall the Secretary be precluded from revoking provisions for simplified reports for any such plan if he finds it necessary to do so in order to carry out the objectives of this subchapter.

(3) The Secretary may by regulation exempt any welfare benefit plan from all or part of the reporting and disclosure requirements of this subchapter, or may provide for simplified reporting and disclosure if he finds that such requirements are inappropriate as applied to welfare benefit plans.

(4) The Secretary may reject any filing under this section–

(A) if he determines that such filing is incomplete for purposes of this part; or

(B) if he determines that there is any material qualification by an accountant or actuary contained in an opinion submitted pursuant to section 1023(a)(3)(A) or section 1023(a)(4)(B) of this title.

(5) If the Secretary rejects a filing of a report under paragraph (4) and if a revised filing satisfactory to the Secretary is not submitted within 45 days after the Secretary makes his determination under paragraph (4) to reject the filing, and if the Secretary deems it in the best interest of the participants, he may take any one or more of the following actions--

(A) retain an independent qualified public accountant (as defined in section 1023(a)(3)(D) of this title) on behalf of the participants to perform an audit,

(B) retain an enrolled actuary (as defined in section 1023(a)(4)(C) of this title) on behalf of the plan participants, to prepare an actuarial statement,

(C) bring a civil action for such legal or equitable relief as may be appropriate to enforce the provisions of this part, or

(D) take any other action authorized by this subchapter.

The administrator shall permit such accountant or actuary to inspect whatever books and records of the plan are necessary for such audit. The plan shall be liable to the Secretary for the expenses for such audit or report, and the Secretary may bring an action against the plan in any court of competent jurisdiction to recover such expenses.

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the

summary plan description, and all modifications and changes referred to in section 1022(a)(1) of this title--

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may

prescribed by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material (including the percentage determined under section 1023(d)(11) of this title) as is necessary to fairly summarize the latest annual report.

(4) The administrator shall upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

(c) Statement of rights

The Secretary may by regulation require that the administrator of any employee benefit plan furnish to each participant and to each beneficiary receiving benefits under the plan a statement of the rights of participants and beneficiaries under this subchapter.

(d) Cross references

For regulations respecting coordination of reports to the Secretaries of Labor and the Treasury, see section 1204 of this title.

Federal Question Raised by Complaint

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 85-39409 CA 19

RICHARD SHAPIRO, et al.,

Plaintiffs,

v.

PANTRY PRIDE ENTERPRISES, INC., etc.

Defendant.

_____/

SECOND AMENDED COMPLAINT

Plaintiffs, by and through their undersigned attorneys, sue Defendant, PANTRY PRIDE ENTERPRISES, INC., (hereinafter "Pantry Pride"), and allege:

1. This is an action for damages that exceed Five Thousand Dollars ($5,000.00).

2. Plaintiffs, [listing of names omitted], were employed by PANTRY PRIDE as management and supervisory level employees at its grocery distribution warehouse in Miami, Dade County, Florida. Plaintiff Clementine F. Petrone is suing as the personal representative of the estate of JAMES A. PETRONE, JR., who was also employed by PANTRY PRIDE as a

management and supervisory level employee at its grocery distribution warehouse in Miami, Dade County, Florida.

3. Plaintiffs, [listing of names omitted], were employed by PANTRY PRIDE as management and supervisory level employees at its grocery distribution warehouse in Jacksonville, Florida.

4. Plaintiffs, [listing of names omitted], were employed by PANTRY PRIDE as management and supervisory level employees at its manufacturing and packaging facilities in Philadelphia, Pennsylvania.

5. PANTRY PRIDE ENTERPRISES, INC. is a corporation organized and existing under the laws of the State of Pennsylvania, having its principal executive offices at 6500 North Andrews Avenue, Fort Lauderdale, Broward County, Florida, and doing business in Florida. PANTRY PRIDE was formerly known as Food Fair, Inc.

6. At all times pertinent to this action, including the dates of employment for each and every Plaintiff, PANTRY PRIDE had in effect, as part of their employment contract for eligible management personnel, a several pay policy ("Policy").

7. The Policy provided, in part, for payment of severance pay on a weekly basis to eligible management personnel affected by the closing of a plant or department. In addition, any vacation which has been earned, remained unused and had not lapsed, together with a pro rata vacation earned to the last day of work, would also be paid on the final payroll.

8. Each and every Plaintiff, at all time pertinent to this action, was an "eligible management employee" as defined by the Policy.

9. Each and every Plaintiff was aware of the Policy and based on said awareness continued in PANTRY PRIDE's employ.

10. On or about June 1, 1976, PANTRY PRIDE issued a codification of the Policy in writing entitled "Food Fair Severance Pay, Policy No. 804." (PANTRY PRIDE's Separation Policy, of June 1, 1976, including provisions for severance pay, is attached hereto labeled as Exhibit "A" and made a part hereof).

11. On or about May 1, 1981, PANTRY PRIDE attempted, without notice and/or consideration, to revise its Policy to the effect that severance pay would not be paid to an eligible employee upon his or her being offered employment by or obtaining successor employment with the purchaser of an operation or department. (Said Revision is attached hereto labeled as Exhibit "B" and made a part hereof).

12. On or about August 5, 1983, PANTRY PRIDE entered into a Purchase and Sale Agreement with Super Valu Stores, Inc,, ("Super Valu") for the sale of PANTRY PRIDE's grocery distribution warehouses located at Miami and Jacksonville, Florida.

13. Said Purchase and Sale Agreement provided in Section 10.4 Employee of Seller:

> Effective as of the Closing Date or the Option Closing Date, as the case may be, the Seller shall afford to the Purchaser the opportunity to interview and hire all of the management employees of the Seller who are employed at the Miami Facility or if the Option is exercised, at the warehouse located at the Jacksonville Facility respectively, and who have not already indicated their intention to terminate their employment, the Purchaser shall be

under no duty whatsoever to hire or extend offers of employment to any former employee of the Seller.

14. Immediately prior to being terminated, the Plaintiffs were orally advised that, although their employment with PANTRY PRIDE was being involuntarily terminated, they would be retroactively excluded from receiving severance pay unless they were either (a) not hired by Super Valu; or (b) remained employed by Super Valu for less than sixteen weeks and were terminated by Super Valu.

15. Plaintiffs were involuntarily terminated by PANTRY PRIDE on the dates contained in Exhibit "C" which is attached hereto and made a part hereof.

16. Plaintiffs' terminations complied with all the requirements for severance pay under the Policy.

17. PANTRY PRIDE rejected Plaintiffs' requests for severance pay and failed to pay the stipulated weekly severance and the unused vacation severance.

COUNT I
BREACH OF EMPLOYMENT CONTRACT

18. Paragraphs one through seventeen are realleged and reaffirmed as if set forth herein.

19. Each and every Plaintiff had a valid employment contract with PANTRY PRIDE.

20. PANTRY PRIDE's severance pay policy was offered as partial consideration for employment, and was a part of its employment contract.

21. PANTRY PRIDE's failure to pay severance to the Plaintiffs was a willful breach of each and every Plaintiff's employment contract with PANTRY PRIDE.

22. PANTRY PRIDE's unilateral attempts to change the Policy were made without consideration or the approval of the Plaintiffs and had no effect on the existing provisions of Plaintiffs' employment contracts.

23. Plaintiffs hired the undersigned attorneys to bring this action and are required to pay them a reasonable compensation, which is recoverable from PANTRY PRIDE pursuant to sections 448.08 of the Florida Statutes.

WHEREFORE, Plaintiffs demand judgment against PANTRY PRIDE for damages, interest, attorneys' fees, the costs of this action, and for such further relief as this Court finds just and proper.

COUNT II
BREACH OF IMPLIED CONTRACT

24. Paragraphs one through sixteen are realleged and reaffirmed as if set forth herein.

25. PANTRY PRIDE's Severance Policy was offered as an inducement to employment, and Plaintiffs relied on the promise of severance pay in their decisions to enter employment with PANTRY PRIDE and to continue such employment.

26. Plaintiffs' reliance upon the Policy was reinforced from time to time when PANTRY PRIDE made severance payments to other employees in accord with the terms of the Policy.

27. Plaintiffs' decisions not to seek employment

elsewhere were based, in part, on the Policy.

28. Defendant voluntarily accepted the benefits of the Plaintiffs' services, knowing that the Plaintiffs were providing their service based, in part, upon the severance Policy. Defendant's refusal to pay the severance pay after accepting the Plaintiffs' services constitutes and [sic] unjust enrichment of the Defendant at the Plaintiffs' expense.

29. Plaintiffs hired the undersigned attorneys to bring this action and are required to pay them a reasonable compensation, which is recoverable from PANTRY PRIDE to [sic] §448.08 of the Florida Statutes.

WHEREFORE, Plaintiffs demand judgment against PANTRY PRIDE for damages, interest, attorneys' fees, the cost of this action, and for such further relief as this Court finds just and proper.

COUNT III
VIOLATION OF E.R.I.S.A.

30. Paragraphs one through seventeen are realleged and reaffirmed as if set forth herein.

31. This Court has jurisdiction pursuant to 29 U.S.C., § 1132(e)(1).

32. PANTRY PRIDE's Policy was an "employee welfare benefit plan" as defined in 29 U.S.C., Section 1002(1).

33. Pursuant to the Employee Retirement Income Security Act, Title 29 of the United States Code, PANTRY PRIDE had certain statutory and fiduciary duties regarding the Policy.

34. PANTRY PRIDE breached its statutory and fiduciary duties toward the Plaintiffs. Said breaches included attempting to unilaterally change and revoke the Policy's provisions to the Plaintiffs' detriment, and failing to pay the severance in accordance with the policy.

35. Plaintiffs hired the undersigned attorneys to bring this action and are required to pay them a reasonable compensation, which is recoverable from PANTRY PRIDE pursuant to 29 U.S.C., Section 1132(g).

WHEREFORE, Plaintiffs demand judgment against PANTRY PRIDE for damages, punitive damages, interest, attorneys' fees and the costs of this action and for such further relief as this Court finds just and proper.

COUNT IV
VIOLATION OF CHAPTER 812

36. Paragraphs one through twenty-two are reaffirmed and realleged as if set forth herein.

37. Plaintiffs' rights and claims to severance pay are "property" as defined by Section 812.012(3)(6) of the Florida Statutes.

38. Each and every Plaintiff had a vested interest in their serverance [sic] pay, pursuant to the terms of their employment contracts with PANTRY PRIDE.

39. PANTRY PRIDE, by making illegal, unauthorized, unilateral changes in the policy and by refusing to pay the Plaintiffs' legitimate claims for severance, made unauthorized use, disposition or transfer of Plaintiffs' property. Said actions constitute "obtaining or using" as defined by Section 812.012(2)(6) of the Florida Statutes.

40. PANTRY PRIDE knowingly obtained or used the property of the Plaintiffs with the intent to, either temporarily or permanently, deprive the Plaintiffs of their right to the property or benefit therefrom, and to appropriate their property for its own use. Said actions constitute theft as defined by Section 812.014 of Florida Statutes.

41. Pursuant to Section 812.035(7), the Plaintiffs are entitled to threefold their actual damages.

42. Plaintiffs are entitled to recovery of the attorneys fees that they incur in this action, pursuant to Section 812.035(7), and to recovery of their investigative and court costs.

WHEREFORE, the Plaintiffs demand judgment against PANTRY PRIDE for damages consisting of the following:

A. Threefold their actual damages;
B. Attorneys' fees, investigative and court costs; and
C. Such further relief as this Court finds just and proper.

Name	Yr Em	Where Employed	Started	Who Told Severance	When Told	What Told
Bradshaw	30	Miami	May 53	Div. Mgr.	1961	2 wks/yr
Davis	27	Miami	Jan 56	Farrell	1969	2 wks/yr
Farrell	40	Miami	Jan 43	Mgt.	1951	2 wks/yr
Fontanazza	19	Miami	Sep 64	Farrell	1970	2 wks/yr
Glover	7	Miami	Sep 73	Farrell	1973	2 wks/yr
Gonzalez	23	Miami	Aug 60	Supervisor	1960	2 wks/yr
Greene	27	Miami	Oct 56	Farrell	1969	2 wks/yr
Gutierrez	2	Miami	May 81	Farrell	1981	2 wks/yr
Hallada, Harold	26	Miami	1957	Farrell	1965	1 wk/yr
Hallada, Heather	13	Miami	Sep 70	Pnl Mgr	1970	1 wk/yr
Herringdine	26	Jax	Sep 58	Chemelews	1958	2 wks/yr

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Hewitt	13	Philly	Jan 71	Predecess	1982	1 wk/yr
Hughes	34	Jax	Jul 50	Chemelews	1959	2 wks/yr
Johns	16	Jax	Oct 68	Law	1970	2 wks/yr
Kane	12	Philly	May 76	Hewitt	1983	1 wk/yr
Katz	17	Miami	Oct 66			1 wk/yr
Logan	23	Jax	Jan 61	Chemelews	1963	2 wks/yr
Menge	28	Miami	Jul 55	Small	1979	2 wks/yr
Poole	28	Jax	May 56	Law	1969	2 wks/yr
Ragans	35	Miami	Dec 48	Menge		2 wks/yr
Richman	24	Jax	Mar 60	Shapiro		1 wk/yr
Rodin	11	Philly	Aug 73	Hewitt	1983	1 wk/yr
Rossi	32	Jax	Nov 53	Alberti	1979	1 wk/yr
Sanmiguel	7	Miami	Nov 76	Pnl Dir	1979	2 wks/yr
Sbaldigi	38	Jax	Dec 47	Pnl Mgr	1970	1 wk/yr
Schuman	26	Miami	Jan 57	Farrell	After	2 wks/yr

Shapiro	21	Miami	Jun 62	Pnl mgr	1962	2 wks/yr
Shemer	46	Jax	Sep 38	Chemelews	1958	2 wks/yr
Smith	19	Jax	Oct 65	Law	1965	2 wks/yr
Soares	24	Miami	Jun 59	Pnl Dir	1969	1 wk/yr
Sulikowski	27	Miami	Jun 56	Pace	1967	2 wks/yr
Sumrall	24	Jax	Jun 60	Alberti		2 wks/yr
Trager	39	Jax	Feb 46	Coworkers	1984	2 wks/yr
Ware	30	Miami	Jan 53	Hughes	1969	2 wks/yr
Washington	29	Jax	Sep 55	Coworkers	After	2 wks/yr

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Lower Court Appendix References

The following references are to the appendix filed in the District Court of Appeal of the State of Florida, Third District, in the lower appeal. Because the appendix is quite voluminous, containing thirty five transcripts of depostions and thirty five answers to interrogatories, the appendix has not been filed with this petition. Respondent did not contest the accuracy of the citations below, and would not contest them here because of their accuracy. The citations are offered to support the information contained in the Chart. The line numbers coincide with the lines of the Chart.

1. (L.App. 480, 482–484, 486, 488, 495, 1197–1203.)

2. (L.App. 509–511, 513–515, 517, 1204–1211.)

3. (L.App. 523, 525–531, 533–534, 536, 1212–1219.)

4. (L.App. 542–546, 548, 1220–1227.)

5. (L.App. 557, 559–560, 562, 564, 568–571, 1228–1231.)

6. (L.App. 577, 581, 583, 586–587, 592, 597–598, 600, 602, 1232–1237.)

7. (L.App. 611–614, 618–621, 1238–1241.)

8. (L.App. 632, 634–636, 639–641, 1242–1249.)

9. (L.App. 650–651, 654–655, 658–661, 1250–1254.)

10. (L.App. 668–669, 674–676, 1255–1259.)

11. (L.App. 688, 690–692, 694, 700–701, 703, 1260–1263.)

12. (L.App. 714, 716–718, 720–722, 725–726, 730, 734, 1264–1272.)

13. (L.App. 746–750, 752–754, 756–757, 766, 768–769, 773, 1273–1277.)

14. (L.App. 782–785, 787, 790, 794, 1278–1281.)

15. (L.App. 802–804, 806–808, 810–812, 817, 819–821, 834–835, 1282–1285.)

16. (L.App. 843–848, 851–854, 1286–1289.)

17. (L.App. 861–866, 868–870, 872–874, 877–878, 1290–1294.)

18. (L.App. 885–891, 893, 895, 897–901, 1295–1296.)

19. (L.App. 910, 912–915, 917–922, 1299–1302.)

20. (L.App. 929–936, 1303–1306.)

21. (L.App. 942–947, 949–951, 954–956, 958, 1307–1310.)

22. (L.App. 964–967, 969, 971–978, 980–983, 1311–1314.)

23. (L.App. 991–996, 998, 1002–1007, 1315–1318.)

24. (L.App. 1013–1016, 1018, 1021, 1023, 1319–1322.)

25. (L.App. 1031–1034, 1036–1038, 1323–1327.)

26. (L.App. 1045–1048, 1050–1054, 1327–1334.)

27. (L.App. 1061–1068, 1070, 1072, 1335–1339.)

28. (L.App. 1078–1082, 1084–1085, 1087, 1340–1343.)

29. (L.App. 1094, 1097–1103, 1105–1106, 1344–1351.)

30. (L.App. 1113–1114, 1116–1119, 1121, 1352–1356.)

31. (L.App. 1127–1131, 1133–1134, 1357–1360.)

32. (L.App. 1139–1141, 1144–1147, 1361–1364.)

33. (L.App. 1153–1157, 1160–1161, 1365–1368.)

34. (L.App. 1168–1171, 1173, 1369–1372.)

35. (L.App. 1181–1184, 1186, 1189, 1190, 1373–1376.)

Severance Policies

1. Two weeks per year of service for a maximum of 16 years, meaning a maximum of 32 weeks severance pay (this is the one Plaintiffs assert applies to them);[18]

2. One week per year of service for a maximum of 16 years, meaning a maximum of 16 weeks severance pay;[19]

3. One week per year of service for a maximum of 16 years, meaning a maximum of 16 weeks severance pay, codified as Policy No. 804 issued June 1, 1976.[20] A limiting condition is added which states:

> No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65) or leaving through voluntary resignation.
>
> An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their [sic] sixty-fifth (65th) birthday occurs.

4. One week per year of service for a maximum of 16 years, meaning a maximum of 16 weeks severance pay, revising

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[18]See Chart.

[19]See Chart.

[20]See Chart.

Policy No. 804[21] as of August 1, 1978. The revision modifies the payment method. Rather than severance pay being paid with the final pay check, severance pay is now paid on a weekly basis.

5. One week per year of service for a maximum of 16 years, meaning a maximum of 16 weeks severance pay, a revision of Policy No. 804[22] under revision date of May 1, 1981 (this is the one that Defendant, Pantry Pride, asserts applies, thereby precluding its obligation to pay). A limiting condition is added which states:

> No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65) or leaving through voluntary resignation, or in accordance with policy and past practice, upon being offered employment by or obtaining successor employment with the purchaser of an operation or department.
>
> An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their [sic] sixty-fifth (65th) birthday occurs.

In addition to the five severance pay policies, there are three supplements to Policy No. 804, which supplements are entitled "Supplementary Compensation Plan", and are labeled by

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[21] This is Exhibit "A" attached to the complaint (R. 47-59) and identified in each of the Plaintiff's depositions as Exhibit "A."

[22] This is Exhibit "B" attached to the complaint (R. 47-59) and identified in each of the Plaintiff's depositions as Exhibit "B."

Defendant as Policy Numbers 804D, E and F[23]. The three supplements are substantially identical. For brevity, the identical language is contained below with the variable language concerning the particular regions enclosed in square brackets.

Policy

In recognition of the need for the stability of experienced personnel for certain activities following the sale and transfer of [Miami Region Warehouse and Distribution Operation] [Rozenco or Waverly] [Jacksonville Region and Distribution Operation], the company will pay supplementary compensation, in addition to that provided for in the applicable severance pay policy, to those [Corporate and Miami Region] [Manufacturing Division, Rozenco, or Waverly] [Jacksonville Region] employees named in accordance with the following formula;

A. With any [Corporate or Miami Region] [Manufacturing Division, Rozenco or Waverly] [Jacksonville Region] employee whose employment is affected by the sale and transfer of the [Miami Region Warehouse and Distribution Operations] [Rozenco, Waverly and Manufacturing Division] [Jacksonville Warehouse and Distribution Operations] and who continues in the employ of the company beyond the sale and transfer of the warehouse and distribution operations[24] shall be eligible to receive a supplemental allowance equal

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[23] These are identified in the deposition of Darrell V. Stiffler, at page 27.

[24] 804E simply provides the date of December 31, 1983.

to one (1) week's pay for each two (2) full years of completed company service measured from the latest date of full time employment through the date of termination, subject to the proviso, however, that no such employee entitled to supplementary compensation, shall receive supplemental payment of less than the equivalent of eight (8) weeks of pay.

Procedures

* * *

In the sale [and transfer of the Miami Warehouse and Distribution Operations to Super Value] [Rozenco and/or Waverly] [and transfer of the Jacksonville Warehouse and Distribution Operations to Super Value], if an employee is offered a [lessor job by Super Value and refuses] [significantly lesser job by the purchaser of Rozenco and/or Waverly] [significantly lessor job by Super Value], he/she shall be entitled to the difference if any, and the total salary received from [Super Value] [the purchaser] [Super Value] and the amount of severance entitlement under the corporate severance policy, at time of termination from Pantry Pride.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail this 8th day of January, 1991, to: KENNETH G. SPILLIAS, ESQUIRE, Shapiro & Bregman, P.A., 777 South Flagler Drive, Suite 310, East Tower, West Palm Beach, Florida 33401.

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(2)

No. 90-1105

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

JEROME H. BRADSHAW, CONNIE DAVIS, THOMAS J. FARRELL, LOUIS FONTANAZZA, JAMES GLOVER, MARIA O. GONZALEZ, DONALD GREENE, ANGEL GUTIERREZ, HEATHER D. HALLADA, HAROLD HALLADA, RUSSELL HERRINGDINE, CHARLES P. HEWITT, WILLIAM N. HUGHES, J. CARLTON JOHNS, MARGARET M. KANE, HOWARD M. KATZ, GLENN H. LOGAN, LAWRENCE R. MENGE, ALLEN T. POOLE, AMOS RAGANS, ALBERT RICHMAN, J. ALBERT RODIN, JOSEPH J. ROSSI, LUIS E. SANMIGUEL, LEONARD SBALDIGI, DAVID SCHUMAN, RICHARD SHAPIRO, DANIEL SHEMER, EUGENE SMITH, ARTHUR SOARES, ALEX SULIKOWSKI, HELEN R. SUMRALL, MELVIN TRAGER, JOHN WARE, WILLIE G. WASHINGTON,

Petitioners,

v.

PANTRY PRIDE ENTERPRISES, INC.,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, State of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On September 20, 1985, Petitioners filed a Complaint against Respondent in the Circuit Court of Dade County, Florida (R. 1-13). An Amended Complaint was filed on September 27, 1985 (R. 14-26). Eventually, a Second Amended Complaint was filed which forms the basis of the state appeal and the present Petition (R. 47-74; Pet. App. 30-37).

The basic factual allegations of the Second Amended Complaint were that Respondent, at all pertinent times, had a severance pay policy; all Petitioners were "eligible management employees" under the Policy and were aware of the Policy during their employment; on or about June 1, 1976, the Policy was codified as set forth in Exhibit "A" to the Second Amended Complaint (Resp. App. 1A-2A); on or about May 1, 1981, Respondent, "without notice and/or consideration" attempted to "revise" its Policy by providing that severance pay would not be available to employees who were offered or who accepted employment with the purchaser of an operation or a department, as set forth in Exhibit "B" to the Second Amended Complaint (Resp. App. 3A-4A); beginning in August, 1983, Respondent sold its grocery distribution warehouses in Jacksonville and Miami; prior to being terminated by Respondent, Petitioners were notified that they would receive no severance unless they were not hired by the purchaser or failed to be employed for at least sixteen (16) weeks; and Respondent rejected Petitioners' requests for severance pay.

The Second Amended Complaint contained four counts – three of which were based on state law claims

and the fourth (Count III) which was based on alleged violations of the Employment Retirement Income Security Act, 29 U.S.C. §§ 1001, et seq. (ERISA). Count III, after stating that Respondent's severance Policy was an "employee welfare benefit plan" as defined under the Act, specifically alleged the following violations of ERISA (Pet. App. 36):

> PANTRY PRIDE breached its statutory and fiduciary duties toward the Plaintiffs. Said breaches included attempting to unilaterally change and revoke the Policy's provisions to the Plaintiffs' detriment, and failing to pay the severance in accordance with the Policy.

No other ERISA violations were alleged in the Second Amended Complaint nor was the pleading ever further amended to include other allegations concerning ERISA.

Respondent's responsive pleadings were filed and the cause was set for trail (R. 141-148, 243). Following pre-trial discovery, Respondent filed its Motion for Summary Judgment pursuant to which a hearing was held and authorities and arguments of counsel were presented to the trial court (R. 262-274, 297-334).

On July 18, 1989, the trial court entered an Order granting Respondent's Motion for Summary Judgment as to the state law claims on the ground that they were preempted by the federal ERISA statute which was the subject of Count III (Pet. App. 9-10). Subsequently, on July 20, 1989, the trial court entered its final Order Granting Defendant's Motion for Summary Judgment as to all counts of the Second Amended Complaint (Pet. App. 7-8).

The pertinent undisputed facts presented to the trial court by the pleadings and documents on file were that Petitioners were former employees of Respondent Pantry Pride who obtained employment with purchasers of the Pantry Pride facilities at which they worked. In each instance, the individual Petitioner's employment with the successor employer involved virtually identical job duties and compensation to that received while employed by Respondent. In addition, Petitioners began working for the successor employer immediately after the effective transfer of the facilities without any break in their employment (R. 262-263, 299).

On June 1, 1976, Respondent had issued a written codification of a severance pay policy (Resp. App. 1A-2A). On May 1, 1981, Respondent issued a written revision to that Policy (Resp. App. 3A-4A). Upon Respondent's sale of its respective operations involving the Petitioners, who all received employment with the successor employer, severance benefits were not offered or paid to Petitioners (R. 49-50, 54-57, 263-264).

In their appeal from the trial court's entry of summary judgment against them, the basis of Petitioners' arguments was that Respondent had violated the disclosure requirements of ERISA in not notifying them of the modification of the severance pay Policy and that, as such, the modified Policy's terms should not be applicable to preclude them from receiving severance pay upon the sale of Respondent's facilities. The Third District Court of Appeal of the State of Florida affirmed the judgment of the trial court. *Bradshaw v. Pantry Pride Enterprises, Inc.*, 566 So.2d 1306 (Fla. 3d DCA 1990) (Pet. App. 1-5). Contrary to Petitioners' assertion (Pet. 1), however,

the appellate court did not construe the terms of a severance plan that was enacted but never communicated. Rather, the appellate court assumed *arguendo* Respondent's violation of the disclosure requirements of ERISA, further assumed that the remedy would be the enforcement of the prior Policy as requested in the Second Amended Complaint and held, nonetheless, that Petitioners were not entitled to severance benefits under the plain terms of that prior policy (566 So.2d at 1307-1308; Pet. App. 4-5). The trial court's judgment was thus affirmed.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petition should be denied because the issues embodied in the "Questions Presented for Review" were not passed upon or decided by the state appellate court.

Petitioners' formulation of their "Questions Presented for Review" by this Court (Pet. i) fails to take into account the fact that the holding of the state appellate court sought to be reviewed here by writ of certiorari makes neither the factual nor legal findings being asserted by Petitioners as the basis for review.

Petitioners seek to have this Court review whether, under ERISA, an employer may modify a severance pay policy without notifying its employees and, thereafter, apply the terms of the uncommunicated modified policy to the employees to deny them severance benefits. While this issue was presented and argued to both the trial court and the appellate court, the appellate court, in the

decision sought to be reveiwed, refused to pass upon this issue. Instead, it based its decision on the application of the plain terms of the very Policy sought to be applied by the Petitioners in their complaint. Since the "Questions Presented for Review" were not passed upon below, they are not appropriate for consideration by this Court under its certicrari jurisdiction. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

2. The petition should be denied because the record demonstrates no denial of any rights under ERISA with respect to the unfunded, unvested severance pay policies at issue.

Assuming *arguendo* that the questions have been properly presented, Petitioners' contentions are, in any event, incorrect and clearly do not merit further review by this Court. First, while the Petition is replete with references to, and arguments about, the effect of alleged disclosure and other procedural violations of ERISA by Respondent, the Second Amended Complaint (Pet. App. 30-37) contains no counts and no allegations regarding substantive harm alleged to have been suffered by Petitioners by virtue of any procedural violations aside from an allegation pertaining to the lack of notice concerning the May 1, 1981, revisions to the severance pay plan (Resp. App. 3A-4A). There are no separate claims for reporting or disclosure violations. Indeed, if there had been, the state court would have been without jurisdiction to try them. 29 U.S.C. §§ 1132(a)(1)(B), 1132(e)(1). Simply stated, alleged procedural violations of ERISA were not properly a matter before the state courts nor are they properly a matter before this Court.

Second, Petitioners contend (Pet. 8-11) that the applicable standard of review is that which was set forth by this Court in *Firestone Tire and Rubber Company v. Bruch*, ___ U.S. ___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) which established the standard of review to be applied in reviewing a plan administrator's denial of benefits based on plan interpretations. The present case, however, as presented in the Second Amended Complaint (Pet. App. 36), as argued by Petitioners' counsel to the trial court (R. 325-331), and as presented to the state appellate court and this Court, is *not* a plan interpretation case. The issue presented here is not the meaning or interpretation of the May 1, 1981 plan but, rather, Respondent's alleged "changes" to the Policy from that which existed prior to May 1, 1981. Indeed, Petitioners have never contested the fact that the language of the May, 1981, Policy clearly and unequivocally precludes them from receiving severance benefits in the circumstances presented here. As such, Petitioners' discussion of *Firestone* and other cases relying on the standard of review applicable to plan interpretation cases is irrelevant and of no support to their contentions here.

Third, Petitioners' contentions that Respondent violated its statutory and fiduciary duties under ERISA by unilaterally changing its severance pay policy in May, 1981, without notice or consideration to them is without merit. Indeed, at the hearing before the trial court, counsel for Petitioners conceded that, under ERISA, employers have the "absolute" right to unilaterally change unfunded, unvested severance pay policies such as that involved here (R. 325, 330). Petitioners' concession in this regard is clearly supported not only by the case

law on the subject but also by the purposes of ERISA as it applies to severance benefits as contrasted with other benefits protected by the statute.

For example, in *Young v. Standard Oil*, 849 F.2d 1039 (7th Cir. 1988), the Seventh Circuit Court of Appeals, in a case strikingly similar in its relevant facts to the present case, held that severance benefits are "welfare benefits" under ERISA, are thus unaccrued and unvested benefits, and may be unilaterally altered or abolished by the employer without violating its statutory or fiduciary duties under ERISA[1]. See also, *Phillips v. Amoco Oil Company*, 799 F.2d 1464 (11th Cir. 1986); *Sutton v Weirton Steel Division of National Steel Corporation*, 724 F.2d 406 (4th Cir. 1984); *Henne v. Allis-Chalmers Corporation*, 660 F.Supp. 1464 (E.D. Wis. 1987).

Contrary to Petitioners' contentions (Pet. 10-20), neither *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985) nor *Harris v. Pullman Standard, Inc.*, 809 F.2d 1495 (11th Cir. 1987) is in conflict with the state court opinion or is of support to Petitioners' positions here. Both *Blau* and *Harris* involved egregious, wholesale violations of

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[1] *Young v. Standard Oil, supra*, was, in part, decided under the "arbitrary and capricious" standard subsequently brought into question by this Court's decision in *Firestone Tire and Rubber Company v. Bruch, supra*. However, in *Young*, the employee challenged both the terms of the severance plan which, as here, had been changed, and the interpretive decision to deny benefits. It is the latter portion of the *Young* case to which the "arbitrary and capricious" standard applied (not at issue here) and the former portion of the decision which is applicable to the present case (i.e., not the interpretation of the plan but, rather, its development).

ERISA's procedural requirements (including active concealment in *Blau*) rising to such a level as to have significance in determining the reasonableness of the employer's administration, i.e. *interpretation*, of its plan. The issue here is not one of reasonableness of interpretation. As such, the mere fact of non-disclosure of a modification to an unfunded, unvested severance pay plan or other procedural irregularities do not rise to the level of substantive harm which would render the modified plan ineffective or inapplicable. *Young v. Standard Oil, supra:* see also, *Blakeman v. Mead Containers*, 779 F.2d 1146 (6th Cir. 1985); *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091 (9th Cir. 1985); *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983).

Petitioners' quotation from *Adcock v. Firestone Tire and Rubber Company*, 822 F.2d 623 (6th Cir. 1987) (Pet. 26-28) is incomplete and misleading. That court's recitation of the District Court's holding regarding the "vesting" of employee benefit plans quoted in the last paragraph at pages 27-28 of the Petition was specifically disapproved of by the Court of Appeals in that very same opinion as an impermissible advisory opinion by the District Court and probably wrong (822 F.2d at 627-628).

Petitioners further rely, as they did in the state appellate court, on the case of *Accardi v. Control Data Corporation*, 658 F.Supp. 881 (S.D.N.Y. 1987). Despite having acknowledged it in their state Reply Brief (Reply Brief of Appellants, 8-9), Petitioners have failed to note here that this case was reversed on appeal in *Accardi v. Control Data Corporation*, 836 F.2d 126 (2d Cir. 1988).

Petitioners simply failed to demonstrate to the state courts, and have failed to demonstrate here, any violation of protected rights under ERISA. Nor have they demonstrated conflict between the decision of the Third District Court of Appeal of the State of Florida and any federal court decisions, or any other reason for this Court to grant their Petition.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

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APPENDIX

EXHIBIT A

P-543 D (2/78)

MANAGEMENT PERSONNEL

SEVERANCE PAY

POLICY NO.: 804
ISSUED: 6/1/76
REVISED:
PAGE: 1 OF 2

FOOD FAIR

Policy

The Company will pay severance pay on a weekly basis to eligible management personnel affected by the closing of a plant or department and who remain actively at work through the date set by the Company in accordance with the following schedule:

Food Fair Service	Severance Pay
Less than one (1) year	None
More than one (1) year	One (1) week's pay for each full year of service with a maximum of sixteen (16) weeks pay.

No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65) or leaving through voluntary resignation.

An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their sixty-fifth (65th) birthday occurs.

Procedure

1. The individual in charge of the division, branch, zone, facility, department, etc. shall submit the name or names of those to be terminated to the Personnel Administration Department sufficiently in advance to permit proper processing.

2. The Personnel Administration Department shall check the calculation and obtain approval from the Industrial Relations Department.

3. The Personnel Administration Department shall pay the severance pay on the final payroll on which the employee appears in an active status.

4. In addition, any earned vacation which has not been used or lapsed, together with a pro-rata vacation earned to the last day of work, shall also be paid on the final payroll.

EXHIBIT B

P-543 D (2/78)

MANAGEMENT PERSONNEL

SEVERANCE PAY

POLICY NO.: 804
ISSUED: 6/1/76
REVISED: 5/1/81
PAGE: 1 OF 2

FOOD FAIR

Policy

The Company will pay severance pay on a weekly basis to eligible management personnel affected by the closing of a plant or department and who remain actively at work through the date set by the Company in accordance with the following schedule:

Food Fair Service	Serverance Pay
Less than one (1) year	None
More than one (1) year	One (1) week's pay for each full year of service with a maximum of sixteen (16) weeks pay.

No severance pay will be paid to employees taking early retirement, normal retirement at age sixty-five (65), leaving through voluntary resignation or in accordance with policy and past practice, upon being offered employment by or obtaining successor employment with the purchaser of an operation or department.

An employee otherwise eligible for severance pay shall not receive any pay beyond the last day of the month in which their sixty-fifth (65th) birthday occurs.

Procedure

1. The individual in charge of the division, branch, zone, facility, department, etc. shall submit the name or names of those to be terminated to the Personnel Administration Department sufficiently in advance to permit proper processing.

2. The Personnel Administration Department shall check the calculation and obtain approval from the Industrial Relations Department.

3. The Personnel Administration Department shall pay the severance pay in weekly or monthly installments in accordance with current pay period practices.

a. Payments will begin at the end of the first non-work week or month (whichever is appropriate) and continue on a week-to-week or month-to-month basis. Payment will cease when the full severance benefit entitlement, as outlined in the above policy, has been paid out to the individual.

4. In addition, any earned vacation which has not been used or lapsed, together with a pro-rata vacation earned to the last day of work, shall also be paid on the final payroll.